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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ERIC L. WASHINGTON, Defendant and Appellant.	B204281 (Los Angeles County Super. Ct. No. TA084988)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur M. Lew, Judge. Affirmed as modified.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael R. Johnsen and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Eric L. Washington, appeals from the judgment entered following his conviction for assault with a firearm and possession of a firearm by a felon, with prior serious felony conviction and prior prison term findings (Pen. Code, §§ 245, subd. (a)(2), 12021, 667, subd. (a) – (i), 667.5).[1] Washington was sentenced to state prison for a term of 13 years.

The judgment is affirmed as modified.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), we find the evidence established the following.

1. *Prosecution evidence.*

On May 21, 2006, Israel Perez was working at a liquor store. Defendant Washington was one of the regulars who both shopped at the liquor store and congregated in front of it with his friends. Perez testified Washington had come into the store throughout the day. Initially he was fine, but later he seemed upset and angry. At about 9:30 p.m., Miguel Gallegos and Salvador Hernandez came in to buy beer. Washington followed them into the store and bumped into Gallegos. When Gallegos told Washington to "Watch out," Washington replied, "I said sorry, mother fucker." Then Washington pulled out a gun and said, "You don't want to die tonight, do you?"

While pointing the gun at Gallegos's face and chest, Washington kept saying, "Please tell me you don't want to die. . . . You want to die, mother fucker." Hernandez tried to calm Washington, who finally lowered the gun and walked out of the liquor store. Perez had overheard the confrontation. He saw Washington pull out the gun and he heard him mention Piru, the name of a local gang. He also heard Washington tell Gallegos, "Say you want to die. I'll take you out."

Gallegos and Hernandez paid for their beer and left the store. Washington was standing outside. Gallegos testified: "[T]hat's when [Washington] started telling me that

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[1] All further statutory references are to the Penal Code unless otherwise specified.

he doesn't know me. I don't know him. I just should go home and fuck my wife. Play with my kids. Like he was giving me another chance to live." Gallegos told Washington he didn't want any problems. He and Hernandez walked back to Gallegos's truck, drove down to the corner and called the police.

Los Angeles County Sheriff deputies responded to Gallegos's 911 call and met him on the street. When Washington, who was still in front of the liquor store, saw the deputies he ran back inside. Perez testified Washington "came over, put the [gun] on the counter, and told [Perez], 'Put this up,' " which Perez did. When the deputies came in, Perez quietly asked one of them to pretend to search him and he told the deputy the gun was behind the counter. The gun was recovered. It was loaded.

After he was arrested, Washington told Detective Valencia that two Hispanic men came into the liquor store, bumped into him, got belligerent and cursed him. Washington said that when he told the two men to calm down the encounter ended. Washington told Valencia, "I'm not the one who had a gun. I'm not saying it was not one there, but I'm not the one who had possession of a gun." Valencia had not said anything to Washington about a gun being involved.

2. *Defense evidence*.

Washington testified that when he and Gallegos bumped into each other, Washington apologized but Gallegos called him a nigger in Spanish. They exchanged words and Washington went back outside. He saw Gallegos and Hernandez leave and walk across the street. After a few minutes, Washington got worried: ". . . I'm thinking they up to something now. Because I see [their] truck, but I don't see them." Due to his anxiety, Washington asked Perez for a gun: "Because I didn't know where these dudes was at. They truck was over at the gas station, but I didn't see them. So I didn't know if they was on foot trying to come back, trying to do something. This is Compton. You know what I'm saying? I didn't know what these S.A.'s [*sic*] is up to. My first instincts were they probably trying to do they stuff."

Perez gave Washington a gun, which Washington gave to one of his friends to hold for him. After 10 or 15 minutes Gallegos and Hernandez had not returned, so Washington gave the gun back to Perez. Then the police showed up.

Anthony Jester testified he had previously worked at the liquor store, and that he knew both Perez and Washington. Jester said there were always a couple of guns laying around on the floor, one of which looked like a "baby Uzi." Jester testified this was the gun the prosecution claimed Washington had used that night.

CONTENTIONS

1. The trial court erred by not instructing, sua sponte, on the defense of necessity.
2. The trial court miscalculated Washington's presentence custody credits.

DISCUSSION

1. *Instruction on necessity defense was not warranted*.

Washington contends the trial court erred by not instructing the jury, sua sponte, on the defense of necessity in connection with the charge of being a felon in possession of a firearm.[2] This claim is meritless.

"[A] trial court's duty to instruct, sua sponte, or on its own initiative, on particular defenses . . . [arises] 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 195.) The standard of review for alleged instructional error is de novo. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, disapproved on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) "The standard for evaluating the sufficiency of the evidentiary foundation is whether a reasonable jury, . . . could find the defendant's actions justified by necessity." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1539.)

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[2] The jury convicted Washington on this charge. After the jury could not reach a verdict on the assault with a firearm charge, and a mistrial was declared, Washington pled guilty to the assault charge.

"Except as to crimes that include lack of necessity (or good cause) as an element, necessity is an affirmative defense recognized based on public policy considerations. [Citations.] To justify an instruction on the defense of necessity, a defendant must present evidence sufficient to establish that she violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which she did not substantially contribute to the emergency. [Citations.]" (*People v. Kearns* (1997) 55 Cal.App.4th 1128, 1134-1135.)

"By definition, the necessity defense is founded upon public policy and provides a justification distinct from the elements required to prove the crime. [Citation.] The situation presented to the defendant must be of an emergency nature, threatening physical harm, and lacking an alternative, legal course of action. [Citation.] The defense involves a determination that the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged. [Citation.] Necessity does not negate any element of the crime, but represents a public policy decision not to punish such an individual despite proof of the crime. [Citation.] [¶] An important factor of the necessity defense involves the balancing of the harm to be avoided as opposed to the costs of the criminal conduct. [Citation.] Unlike duress, the threatened harm is in the immediate future, which contemplates the defendant having time to balance alternative courses of conduct. [Citation.]" (*People v. Heath* (1989) 207 Cal.App.3d 892, 900-901.)

People v. King (1978) 22 Cal.3d 12, held the necessity defense could be used to defend against a charge of being a felon in possession of a gun (§ 12021). *King* held: "[I]n enacting section 12021 the Legislature did not intend to deny persons described by

that section the right to use a concealable firearm[3] in defense of self or others in emergency situations . . . ." (*Id.* at p. 15.) "Thus, when a member of one of the affected classes is in imminent peril of great bodily harm or reasonably believes himself or others to be in such danger, and without preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it in self-defense continues, does not violate section 12021." (*Id.* at p. 24.)

Washington argues his case falls under the reasoning of *King* because he testified "he became fearful when he could see Gallegos' truck, but could no longer see Gallegos or Hernandez. Appellant at that point, recognizing that he was in a dangerous area, became concerned as to what Gallegos and Hernandez were 'up to.' It was then, according to appellant, that [he] went into the store and asked Perez for a gun, in order to protect himself." Washington argues he "did not know where the two men were, and could have been attacked imminently," and that "[he] had a good faith belief in the necessity of defending himself. . . . [H]e was in a dangerous part of Compton. Unfortunately, it was an area where violence was endemic and guns were commonplace. Under these circumstances, [his] belief was objectively reasonable . . . ."

We are not persuaded. Washington's situation was nothing like the felon's situation in *King*. King had been a guest at a party that was invaded by violent party crashers who threw a hibachi grill through the dining room window, hitting King and spraying him and a wheelchair-bound guest with glass. There was "no safe egress . . . possible" from the apartment, and "the nature of this assault was such as to have caused fear and near hysteria among other persons in the apartment who lacked the capacity to defend themselves." (*People v. King*, *supra*, 22 Cal.3d at p. 26.) While one of the party guests was trying to get the police on the phone, another guest took a gun from her purse and handed it to King. King used the gun to scare off the attackers by shooting over their heads.

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3 Section 12021 no longer requires the firearm to be concealable.

Unlike the defendant in *King*, Washington failed to satisfy several elements of the necessity defense. There was no evidence Washington faced an "imminent peril of great bodily harm." (*People v. King*, *supra*, 22 Cal.3d at p. 24.) According to Washington, Gallegos and Hernandez had done no more than insult him and argue with him; they had not attacked him or even threatened to harm him. Moreover, Gallegos and Hernandez had already left the store and gone across the street before Washington procured the gun. Therefore, Washington had reasonable alternatives: he could have stayed in front of the liquor store with his friends who, presumably, would have given him support; he could have called the police; or, he could have walked back into the liquor store and had Perez call the police. Even if Washington sincerely believed he was in imminent danger merely because he had lost sight of Gallegos and Hernandez, that belief was not objectively reasonable.

A reasonable jury could not have found that Washington's actions were justified by necessity. (See *People v. Kearns*, *supra*, 55 Cal.App.4th at pp. 1132-1135 [although defendant testified the man who had raped and beaten her then threatened to kill her if she refused to commit a robbery, she could have asked the robbery victim to call police]; *People v. Pepper* (1996) 41 Cal.App.4th 1029, 1036 [necessity defense unwarranted in section 12021 case where defendant claimed he took possession of rifle only to keep it away from a child, because he could have instead led the child away from the gun]; *People v. McKinney* (1986) 187 Cal.App.3d 583, 585 [necessity defense properly rejected because defendant had not "sought protective custody or reported to prison authorities the threats by other inmates or the rumor of the concealed shank"].)

Hence, the trial court did not err by failing to instruct, sua sponte, on the defense of necessity.

2. *Washington's presentence custody credits must be corrected.*

Washington contends the trial court incorrectly calculated his presentence custody credits. The Attorney General properly agrees there was error.

Section 2933.1, subdivision (a), provides: "Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933." The trial court applied this limitation, apparently on the theory it was mandated by Washington's conviction for assault with a firearm. However, section 667.5, subdivision (c)(8), includes firearm convictions only in the following context: "Any felony . . . in which the defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of Section 12022.3, or Section 12022.5 or 12022.55." Washington only pled guilty to the assault charge itself; he did not admit the firearm use allegation and, therefore, the section 2933.1 limitation did not apply.

"A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered." (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647 ["We shall award defendant 390 days of presentence custody credit and shall direct the trial court to prepare a corrected abstract of judgment showing this award."]; see also *People v. Acosta* (1996) 48 Cal.App.4th 411, 428, fn. 8 ["The failure to award an adequate amount of credits is a jurisdictional error which may be raised at any time."].)

"Under section 4019, presentence conduct credit is calculated 'by dividing the number of days spent in custody by four and rounding down to the nearest whole number. This number is then multiplied by two and the total added to the original number of days spent in custody. [Citation.]' [Citation.]" (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1176, fn. 14.) Hence, Washington's judgment should be amended to reflect credit for 498 days actual presentence custody, plus 248 days for good conduct, for a total of 746 days.

DISPOSITION

The judgment is affirmed as modified. The abstract of judgment shall be amended to reflect an award of presentence custody credits in the total amount of 746 days. The trial court is directed to prepare an amended abstract of judgment reflecting this change and forward it to the Department of Corrections.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.